

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN SHAUNTA WEATHERS,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2005

No. 250684

Wayne Circuit Court

LC No. 03-001348-01

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of six counts of assault with intent to commit great bodily harm less than murder, MCL 750.84, and one count each of discharging a weapon at a dwelling, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of one hundred months to twenty years for each of the assault convictions, two to four years for the discharge of a weapon conviction, two to five years for the felon in possession of a firearm conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We reverse and remand for a new trial. This case is being decided without oral argument pursuant to MCR 7.214(E).

We conclude that our Supreme Court's decision in *People v Russell*, 471 Mich 182, 187-188, 190-192; 684 NW2d 745 (2004), requires reversal of defendant's convictions because defendant did not effectively waive his right to representation by counsel and appointed counsel was not permitted to represent defendant during a significant portion of defendant's trial.

On the first day of trial, defendant's trial counsel, the third attorney appointed to represent defendant throughout these proceedings, informed the trial court that defendant no longer desired his representation. Defendant asked the trial court to appoint a new attorney, or to allow him time to retain his own attorney or prepare to represent himself. The trial court replied that the trial would not be adjourned (as it had been previously) and that defendant could have retained counsel represent him only if there was an attorney available to go to trial immediately, obviously highly unlikely. The other options offered defendant by the trial court were to continue with his current attorney or to represent himself. Defendant remained unwilling to accept his appointed counsel's representation, but wanted more time to prepare to represent himself. The trial court interpreted defendant's position as a decision to waive his Sixth Amendment right to counsel and exercise his right to represent himself. The trial court

instructed defense counsel to sit at the defense table, but not to participate in the trial in any way unless defendant changed his mind. The trial court interpreted a remark by defendant as a refusal to remain in the courtroom and participate in the trial so it had him removed to “the back”<sup>1</sup>. During the trial, the trial court repeatedly directed defense counsel to ask defendant if he wanted to join the proceedings which defendant declined until late in the proceedings. Defense counsel did not exercise any peremptory challenges of prospective jurors during jury voir dire, or make an opening statement, and he did not cross-examine any prosecution witnesses or introduce any evidence.

On the second day of trial, after all prosecution witnesses had testified, defendant joined the proceedings and informed the trial court that he intended to make his own closing argument. The trial court asked him whether he was certain that he wanted to forego counsel’s assistance and make his own argument. When defendant failed to respond, the trial court determined that defendant had not unequivocally waived his right to counsel, and ordered defense counsel to represent him. Defense counsel subsequently gave a closing argument on defendant’s behalf.

Defendant now argues that he was denied his Sixth Amendment right to counsel. In *Russell*, our Supreme Court held that a trial court may not permit a defendant to represent himself unless the defendant has unequivocally waived his right to counsel, and that a defendant’s rejection of court-appointed counsel does not constitute an effective waiver of this right. *Id.* at 187-191, 194. Before determining that a defendant has effectively waived his right to counsel, the trial court “must determine that (1) the defendant’s request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant’s self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court’s business.” *Id.* at 190, citing *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976). The trial court also must comply with MCR 6.005(D), which requires the court to advise the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risk involved in self-representation, and to offer the defendant the opportunity to consult with an attorney. *Russell, supra* at 190-191. If the trial court fails to substantially comply with these requirements, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel. *Id.* at 191-192, citing *People v Adkins (After Remand)*, 452 Mich 702; 551 NW2d 108 (1996). The Supreme Court in *Russell* emphasized “it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of the right to the assistance of counsel.” *Russell, supra* at 188.

The Supreme Court in *Russell* concluded that the defendant had not waived his right to counsel, because he unequivocally stated that he did not want to represent himself. *Id.* at 192-193. The Supreme Court rejected this Court’s reasoning that the defendant had effectively elected to represent himself by rejecting court-appointed representation. *Id.* The Court also observed that “[t]he complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal.” *Id.* at 194 n

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<sup>1</sup> Defendant’s location was later described as “the bull pen” and was presumably a holding area for prisoners.

29, citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), and *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

In the instant case, the trial court's response to defendant's refusal of defense counsel's representation was just such a structural error. The trial court, by instructing defense counsel to sit at the defense table, but not participate in the trial in any way unless requested by defendant, effectively determined that defendant had opted to represent himself without first questioning defendant to ascertain that his "decision" was unequivocal, or that he was making a knowing, intelligent, and voluntary waiver of his right to counsel. The trial court also failed to comply with MCR 2.605(D) by advising defendant of the charge and the possible penalties.

Although the Court in *Russell* left open the possibility that a defendant's desire to proceed pro se could sometimes be inferred by conduct, *Russell, supra* at 194 n 24, defendant's conduct in the instant case does not support such an inference. Defendant's refusal to participate in the proceedings cannot be reasonably construed as an unequivocal and knowing waiver of his right to counsel. Defendant indicated that he was unprepared to represent himself, and refused to even attempt to represent himself. The trial court apparently assumed that it had no other options than to require defendant to represent himself or adjourn the proceedings while defendant obtained substitute counsel. But the Supreme Court in *Russell* held that a trial court has the discretion to continue the proceedings with the undesired appointed attorney serving as the defendant's counsel. *Id.* at 194 n 28. In this case, defendant, without effectively waiving his right to counsel, was denied his right to counsel at every critical stage of the proceeding except closing argument. Reversal is required. *Id.* at 194 n 29.

In light of our decision, it is unnecessary to address defendant's remaining issues.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Jessica R. Cooper